



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/26907/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision &  
Promulgated**

**Reasons**

**On 27 September 2017**

**On 10 October 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE APLEYARD**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR MD SHAJEDUR RAHMAN SHAJID  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr C Bramble, Home Office Presenting Officer.

For the Respondent: Mr A Razzaq-Siddiq, Counsel.

**DECISION AND REASONS**

1. The Appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal with the Secretary of State referred to as “the Respondent” and Mr Md Shajedur Rahman Shajid as “the Appellant”.

2. The Appellant is a citizen of Bangladesh who on 3 October 2014 made application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the Points Based System. Prior to submitting his application, on 6 August 2013, he applied for leave to remain as a Tier 4 (General) Student Migrant. For this application, he submitted a TOEIC certificate from the Educational Testing Service (ETS) to his Sponsor in order for them to provide him with a Confirmation of Acceptance of Studies (CAS).
3. ETS has a record of the Appellant's speaking test. Using voice verification software, ETS is able to detect when a single person is undertaking multiple tests. ETS undertook a check of the Appellant's test and confirmed to the Respondent that there was significant evidence to conclude that the certificate was fraudulently obtained by the use of a proxy test taker. ETS declared the Appellant's test to be invalid. On the basis of this information, the Respondent was satisfied that the certificate was fraudulently obtained and as a result the Appellant's application was refused with reference to paragraph 332(2) of the Immigration Rules HC 395 (as amended) and paragraph 320(7B). The Respondent communicated the same to the Appellant on 10 July 2015. The Appellant appealed and as his application was lodged after 6 April 2015, the Appellant's right to appeal was limited to human rights grounds only.
4. That appeal was heard by Judge of the First-tier Tribunal Kainth who in a decision promulgated on 19 December 2016 allowed it. The conclusion to his decision stating that:-

"The appeal is allowed to the extent that the Respondent is yet to make a lawful decision."

5. The Respondent sought permission to appeal which was granted by Judge of the First-tier Lambert in a decision dated 25 July 2017. The Judge's reasons are:-
  1. The Respondent seeks permission to appeal, 10 days out of time, against a decision of the First-tier Tribunal (Judge Kainth) who, in a decision promulgated on 19/12/16 allowed the Appellant's appeal against the Secretary of State decision to refuse leave to remain as a Tier 4 migrant. The late application is unexplained, but I note that it occurred over the Christmas/New Year holiday period.
  2. The issue was a claimed fraudulent English language test result. The grounds challenge the judge's finding that the Secretary of State had not discharged the burden of proof of proving deception, arguing failure to have regard to all the evidence and to the Court of Appeal decision in **Shehzad** [2016].
  3. There is an arguable absence of adequate evidence based reasoning in the judge's conclusions at paragraphs 15 and 17,

compounded by arguable failure to distinguish between, and to make findings in relation to satisfaction of, the respective evidential burdens on each party and the ultimate legal burden of proof on the respondent.

4. There is therefore an arguable error of law disclosed by the application. Time is extended.”
6. Thus the appeal came before me.
7. At the outset Mr Bramble handed up the authority of **Majumder v SSHD [2016] EWCA Civ 1167** and submitted that the circumstances of this appeal fell within Category 3 as referred to in paragraph 32 of the decision in **Majumder**. It states:-

“The third category also consists of appeals by the Secretary of State, but where the appeal is against the decision in which it was held that the generic evidence had not discharged the initial evidential burden and was thus erroneous in that respect, but that other evidence meant that the Secretary of State would not have been able to discharge the legal burden. Mr Kovats indicated that in this class of case, also without giving an undertaking in respect of any particular case, the Secretary of State was minded to concede and to abandon the appeal.”
8. In those circumstances, he submitted, there is within the Judge’s decision a material error of law and the appeal should be remitted to the First-tier Tribunal for a de novo hearing.
9. Mr Razzaq-Siddiq, naturally, did not try to persuade me otherwise.
10. I share Mr Bramble’s analysis and find that within the decision of the First-tier Tribunal Judge there is a material error of law.

## **Decision**

The making of the decision of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh pursuant to Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice 7. (b), before any Judge aside from Judge Kainth.

No anonymity direction is made.

Signed

Date 9 October 2017.

Deputy Upper Tribunal Judge Appleyard

